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No. 09-1305

IN THE

Supreme Court of the United States

ZURICH AMERICAN INSURANCE CO., *et al.*,
Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND PIONEER NATURAL RESOURCES COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' ("Pioneer's") position only underscores the importance of the question presented and the conflict between the decision below and the precedents of this Court and other circuits. In 9 U.S.C. § 16(a)(1)(C), Congress provided an express right to appeal any decision denying arbitration in a case removed under the Convention, to ensure federal appellate vindication of the strong federal policy favoring arbitration. Yet in the view of Pioneer and the Fifth Circuit, any district court can permanently deny federal jurisdiction to a party seeking to vindicate its right to arbitrate under the Convention—including the express right to federal appellate review—by simply remanding a case at the

same time, rather than after, the court rejects a motion to compel arbitration.

This is not what the signatories to the Convention had in mind, nor is it what Congress intended when it codified the Convention and enacted a specific statutory right to interlocutory appeals from denials of arbitration. It is also not what the precedents of this Court and other circuits provide. The Court's review is therefore warranted to resolve these conflicts and to vindicate the provisions of the Convention and Federal Arbitration Act favoring arbitration. And at a bare minimum, the Court should not allow the Fifth Circuit to vitiate Congress's policies without stating the reasons for a dispositive jurisdictional ruling made for the first time on appeal.

I. THE ISSUE IS IMPORTANT.

1. Pioneer does not dispute that the issue is important. Instead, it surmises—without support—that Congress made a policy judgment that vindicating arbitration agreements is not "important *enough* to justify an exception to [28 U.S.C.] § 1447(d)'s general prohibition against review of remands." Opp. 20 (emphasis in original). Pioneer suggests that if Congress wanted to permit review of the District Court's decision against arbitration in this case, it would have done so by an express exception from Section 1447(d). *Id.* Congress unequivocally showed, however, that agreements under the Convention *are* important enough to mandate federal appellate review by enacting a specially-designed removal provision that makes an initial determination of federal jurisdiction conclusive whenever a case "relates to" a covered agreement, and a statutory right to interlocutory appeal of all denials of arbitration under the

Convention. No specific exception from Section 1447(d) was needed, because a comprehensive statutory scheme provides for both federal court and appellate jurisdiction here.

Pioneer's assertion that there is "no sign" that Congress intended to depart from "settled procedural principles" regarding remands, Opp. 22, ignores the plain language and design of the Convention's special removal provision, 9 U.S.C. § 205. Unlike normal removal statutes, Section 205 has special provisions favoring removal that lengthen the time for removal (until trial, rather than 30 days), permit removal based on allegations in the removal petition (rather than just the complaint), and, above all, expand jurisdiction over actions that merely "relate[] to" agreements falling under the Convention, making it "one of the broadest removal provisions * * * in the statute books." *Acosta* v. *Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 (5th Cir. 2006).

In arguing for application of Section 1447(d), Pioneer makes much of Section 205's provision that "[t]he procedure for removal of causes otherwise provided by law shall apply," but this plain language incorporates only procedures for *removal* (such as what to file, etc.), not procedures and standards for a *remand* order, or its appealability. Consistent with Congress's intent to make the determination of federal jurisdiction conclusive under the Convention, Section 205 includes no provision for remand at all. And the express language of Section 16(a)(1)(C) creates a right to appeal any "order * * * denying an application under section 206 of this title to compel arbitration," ensuring, as this Court held in *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896 (2009), that a denial of arbitration may receive federal

appellate review regardless of subsequent consideration of the merits by the district court or court of appeals.

This specific question for which Congress mandated appellate review is different from the general question governed by Section 1447(d). Unlike Section 1447(d), the Convention addresses the question of *whether* a dispute will be resolved by arbitration or litigation, not merely *where* it will be litigated. *See* Pet. 18-19. Because federal policy and the Convention, unlike many state laws, strongly favor arbitration, Congress ensured interlocutory federal appellate review of any decision *denying* that right, while expressly prohibiting such review of decisions *granting* arbitration. *Compare* 9 U.S.C. § 16(a) *with* 9 U.S.C. § 16(b).

Pioneer's position and the Fifth Circuit's decision eviscerate those express statutory provisions. Congress stated that if a court rejects a contention that a dispute is arbitrable—for whatever reason—thereby requiring the parties to litigate, an interlocutory right of appeal exists. The most common reason to deny arbitration is because the court finds a lack of an agreement to arbitrate. Thus, under the decision below, a district court could circumvent Section 16(a) in almost every instance where it would otherwise apply to a removed case, merely by denying arbitration at the same time as, rather than before, remanding to state court.

2. Pioneer nevertheless asserts that Section 16(a)(1)(C) cannot apply here because the District Court did not really deny a motion to compel arbitration. *See, e.g.*, Opp. 9. The Fifth Circuit made no such holding, and Pioneer's attempt to avoid the issues fails in any event. When the District Court

issued the order under review, it had before it the Underwriters' motion to compel arbitration and Pioneer's motion to remand some—but not all—claims. *See* Pet. App. 24a ("This matter is before the court on a motion by defendants * * * to compel arbitration * * *."); *id.* at 36a ("The Underwriters' motion to compel arbitration * * * requires the court *in this ruling* to engage in contract interpretation.") (emphasis added); Pet. 10 (motion to remand related only to some claims). The order then expressly denied the Underwriters the right to arbitrate, on the ground "that no valid agreement exists between the parties to submit the disputes to arbitration." Pet. App. 36a.

This order was unquestionably an order "denying an application * * * to compel arbitration" that is expressly appealable under Section 16(a)(1)(C). *See* H.R. Rep. No. 100-889, at 36-37 (1988) ("interlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate"). The Fifth Circuit has so held in materially indistinguishable circumstances. *See Dahiya* v. *Talmidge Int'l, Ltd.*, 371 F.3d 207, 210 (5th Cir. 2004) ("[a]ny order remanding for lack of subject matter jurisdiction necessarily *denies* all other pending motions") (emphasis added).

Pioneer's argument underscores the absurdity of its ultimate position. It is undisputed that if the District Court had denied the motion to compel arbitration even just a moment before it remanded the case, that denial would be expressly appealable under Section 16(a). *See* Pet. 24. Pioneer offers no reason, and there is none, why a district court should be able to manipulate that express grant of appellate

jurisdiction by expressly holding, in ruling on a motion to compel arbitration, "that no valid agreement exists between the parties to submit the disputes to arbitration," Pet. App. 36a, and then remanding the case at the same time.

According to Pioneer, the court's ruling on the critical question of arbitration is rendered unreviewable by this legerdemain "'no matter how plain the legal error.'" Opp. 17 (citation omitted). But that is the exact opposite of Congress's intent when it enacted Section 16(a)(1)(C) to implement an international treaty. Whereas Congress bestowed immediate federal appellate review over any decision rejecting arbitration under the Convention in order to ensure a uniform body of federal law, the Fifth Circuit's decision instead relegates the critical issue of arbitration to the *ad hoc*, unreviewable judgments of hundreds of district court judges.

As one judge has noted in a similar case:

> The net result of [the Fifth Circuit's] errors is to frustrate the intention of Congress * * * to give foreign parties the right to choose arbitration as a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy associated with arbitration. If the provisions of § 1447(d) will always trump the provisions of 9 U.S.C. § 16, then the Convention will be unenforceable in the State of Louisiana * * *.

Dahiya v. *Talmidge Int'l Ltd.*, 380 F.3d 218, 219 (5th Cir. 2004) (DeMoss, J., dissenting from denial of rehearing en banc); *see also Dahiya*, 371 F.3d at 214 n.3 (issue "cries out for immediate remedy from the Supreme Court") (DeMoss, J., dissenting).

Where, as here, the pleadings show that claims "relate[] to" an agreement falling under the Convention, federal jurisdiction has been conclusively established and any decision rejecting arbitration is expressly appealable under Section 16(a)(1)(C), notwithstanding Section 1447(d).[1]

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER CIRCUITS.

1. This Court should not allow the conflicts with the precedents of this Court and other circuits to persist. Pioneer claims that *Arthur Andersen* does not conflict with the decision below because that case did not involve a remand. Opp. 8. Pioneer further (and implausibly) asserts that *Arthur Andersen*'s reasoning is "fully consistent" with the Fifth Circuit's decision to deny all appellate review here, because it believes that the "category of order appealed from," 129 S. Ct. at 1900, is only a remand for lack of

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[1] Contrary to Pioneer's implications, *cf.* Opp. 19-20, the District Court never reversed its initial holding that Pioneer's claims "relate to" an arbitration agreement falling under the Convention—the AEGIS policy—under the broad removal standards of Section 205. *See* Pet. App. 17a, 22a; *Beiser* v. *Weyler*, 284 F.3d 665 (5th Cir. 2002). Rather, the court later held (erroneously, in the Underwriters' view) only that the Underwriters and Pioneer had not themselves agreed to the arbitration terms of the AEGIS policy. Regardless of the court's erroneous state-law construction that the "following form" provision did not incorporate the mandatory arbitration provisions of the AEGIS policy, this dispute continues to "relate to" that agreement. Indeed, it is undisputed that the AEGIS policy is effective, and that the parties are currently arbitrating, under that policy, many of the same coverage disputes as are at issue in this case. *See* Pet. 7; Pet. App. 7a. Thus, "relates to" jurisdiction never disappeared, even if the District Court found reasons not to compel arbitration.

subject matter jurisdiction, not an order denying a motion to compel arbitration. Opp. 9.

Pioneer's single-minded focus on the District Court's purported characterization of its order leads it to ignore *Arthur Andersen*'s precedential effect. The only "category of order appealed from" under Section 16(a)(1) is the District Court's denial of the Underwriters' motion to compel arbitration. A reversal on that question will result in the avoidance of litigation entirely—the specific subject for which Section 16(a) provides a right of appeal—rather than the general subject addressed by Section 1447(d), *i.e.*, whether litigation will proceed in state or federal court. The reasoning of *Arthur Andersen* applies equally to this case.

Osborn v. *Haley*, 549 U.S. 225 (2007), governs this case, not *Powerex Corp.* v. *Reliant Energy Servs.*, 551 U.S. 224 (2007) In *Osborn*, the Court held that for nearly two decades the lower courts had misinterpreted a specialized removal provision not to defeat Section 1447(d). Likewise here, more than two decades after the enactment of Section 16, some circuits persist in permitting Section 1447(d) to defeat federal appeal rights, notwithstanding the far more recent and specific enactment of Section 16. The Court's review is warranted to resolve the conflict between these decisions and this Court's precedents.[2]

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[2] Pioneer faults the Underwriters for not having relied on this Supreme Court authority in the Fifth Circuit. *See* Opp. 24. But there was no need for the Underwriters, in the proceedings below, to have noted the conflict between Fifth Circuit authority and this Court's precedents. The Underwriters had contended that Fifth Circuit precedent, when properly applied, allowed this appeal. *See* Opp. 5. Now that that court has

Just as in *Osborn*, Section 205 and Section 16(a)(1)(C) create an "anti-shuttling" statute that conclusively determines federal jurisdiction. Section 205 expressly permits removal based on whether the action, as described in the pleadings (not the arbitration agreements) "relates to" an agreement under the Convention. Once that determination is properly made on the basis of the pleadings or removal petition, as it was here, federal jurisdiction is conclusively determined and there is no authorization for a subsequent remand. Section 16 completes the design, by ensuring that even if a district court concludes there is no agreement, the party denied the right to arbitration has the right to an interlocutory appeal in federal court. These provisions ensure that jurisdiction is readily determined, and that the subsequent decision about arbitration is decided in federal court, including on appeal if arbitration is denied. As in *Osborn*, this comprehensive scheme has an "anti-shuttling" effect that replaces Section 1447(d).

Powerex, by contrast, has no relevance. Pioneer notes that the Foreign Sovereign Immunities Act ("FSIA"), which was at issue in *Powerex*, like the Convention, has international implications. Opp. 20. But aside from this superficial point, the cases involve sharply distinguishable statutory provisions that demonstrate diverging Congressional intent. The FSIA had no special provision bestowing appellate jurisdiction over the determination at issue. Here, by contrast, the motion to compel arbitration invoked a specific statutory right of appeal, through which Congress specifically intended

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rejected that contention, the conflict has squarely presented itself.

for the courts of appeal to correct erroneous determinations denying arbitration. Unlike in *Powerex*, where the Court held that Congress's intent in the text of Section 1447(d) "prevails over what it ought to have done," 551 U.S. at 238, in this case the Underwriters squarely rely on what Congress actually did in the text of Section 16(a)(1)(C).

2. There is no "consensus" among the circuits. Opp. 17. Pioneer's effort to distinguish *Reddam* v. *KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), fails. That case was remanded under Section 1447(c); thus, it would be unappealable under Fifth Circuit law. But the Ninth Circuit held that it had jurisdiction under Section 16(a). That holding was not dicta; it was an alternative basis for jurisdiction. Nothing *Powerex* says about the "post-removal event" doctrine matters here, because that is not the basis for the court of appeals' jurisdiction in this case. And Pioneer's speculation about if or when the Ninth Circuit might revisit *Reddam* is baseless (or, if anything, concedes its ongoing importance). *Reddam* squarely conflicts with the decision below.

Pioneer's discussion of other cases misses the point. Pioneer does not dispute that another circuit has recognized a conflict among the circuits on precisely the issue raised in this case, or dispute the accuracy of that characterization. *See Restoration Pres. Masonry* v. *Grove Europe*, 325 F.3d 54, 59 (1st Cir. 2003). And the cases cited from other circuits did not involve remand orders only because these courts apply the law in conflicting ways. For example, in *Sarhank Group* v. *Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005), and *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 102 (3d Cir. 2000), the courts held that a determination that a case "relates to" an

arbitration agreement covered by the Convention is not subsequently divested by a later determination that the parties had no valid arbitration agreement. In those circuits, orders such as that at issue here, which reject motions to compel arbitration on the ground that the parties allegedly did not agree to arbitrate, are fully reviewable under Section 16(a)(1)(C) and will not give rise to unreviewable remand orders.

III. ALTERNATIVELY, THE COURT SHOULD REQUIRE THE FIFTH CIRCUIT TO EXPLAIN ITSELF.

Alternatively, the Court should vacate the Fifth Circuit's judgment and remand for the court to explain, if it can, the reasoning for denying the appellate forum mandated by Congress. Pioneer says that the Fifth Circuit's unexplained dismissal is "easily explained" because the court "no doubt" concluded that an opinion applying specific prior cases "would have no precedential significance and that it was unnecessary to write one." Opp. 24-25. But the Fifth Circuit itself said none of this; it said nothing at all. It not only failed to write a single word of opinion, but failed even to cite the authority that Pioneer now surmises was dispositive.

Pioneer does not dispute that this Court has remanded other cases where the lower court failed to explain its reasoning. Pet. 32. Nor does it respond to the contention in the petition that a GVR is particularly warranted here, because the Fifth Circuit was the first court that could opine on the dispositive question of appellate jurisdiction. *See* Pet. 32-33. For this Court to fully discharge its review responsibilities, it must first know exactly what it is reviewing. The Underwriters believe that

the end result ordained by the Fifth Circuit—the refusal to review an issue that Congress decreed is subject to appellate review—itself demonstrates a conflict with precedent. But to the extent the Court is not inclined to grant plenary review on the present record, it should at a bare minimum require the Fifth Circuit to explain itself. It is bad enough that the court refused to review what Congress said it must; it is intolerable that the court did so without even attempting to justify that decision.

CONCLUSION

The petition should be granted and the judgment below reversed. In the alternative, the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration supported by an opinion.

Respectfully submitted,

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